(28)

IN THE

Supreme Court of the United States

—o—o—

October Term, 1944

—o—o—

No. 385

—o—o—

J. L. BRANDEIS & SONS,

Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

—o—o—

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT

—o—o—

REPLY BRIEF OF PETITIONER

—o—o—

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Law Briefs—OMAHA LINO-SLUG CO.—413 So. 15th St.

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MISCELLANEOUS

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To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

This Brief is filed pursuant to Supreme Court Rule 38 (4) (a) in reply to the Brief filed herein for the Respondent, National Labor Relations Board, in opposition to the Petition for Writ of Certiorari.

PRELIMINARY STATEMENT

This Reply Brief is occasioned by the facts that such Brief in Opposition—

(a) Understates in its "Statement" (page 2 of Board's Brief) the facts in certain important respects.[1]

(b) Does not address itself to the grant vel non of Certiorari.[2]

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1 The Statements on page 3 should be amplified by the detail in Footnote 6 on page 5 of the Petitioner's Petition, which throws an entirely different complexion upon the assertions of fact made in the Board's Brief. Thus, "approximately $150,000 worth (of total sales) were made to out-of-state customers" (repeated, again, at page 5 of the Board's Brief) is delusory in the light of the further fact that two-thirds of such sales were made and completed on the Store premises; again "Petitioner's mail orders * * * were approximately valued at $121,274" is incomplete without the further explanation that they represented in large part merchandise purchased by local customers but sent away as gifts to relatives, to children away in school, to customers while on vacations and so on, and, thus, represented only a casual, incidental or occasional departure from the usual and characteristic course of a business, devoted to local retail sales.

2 The Board's challenge to the grant of Certiorari is contained in one sentence at the bottom of page 4 of the Board's Brief. But the exactly contra holding in **Consolidated Edison Company v. National Labor Relations Board** (C. C. A. 2), 95 Fed. (2d) 390, 393, aff'd 305 U. S. 197, 83 L. ed. 126, that "* * * the labor disputes of a local merchant will not normally fall within the Board's jurisdiction, even though some part of his stock in trade originates outside of the State," cannot properly be denominated dictum, when this Court, in affirming, said thereof, "* * * We may lay on one side, as did the Circuit Court of Appeals, the mere purchases by the utilities of the supplies * * * which come from without the state * * *"; nor can the holding in **National Labor Relations Board v. White Swan Company** (C. C. A. 4), 118 Fed. (2d) 1002, certificate returned unanswered, 313 U. S. 23, 85 L. ed. 1164, "that the volume of interstate business involved in the purchase of supplies is not sufficient to bring the business of Respondent within the jurisdiction of the Board" be called dictum, when it was one of the two grounds upon which jurisdiction was predicated and decided.

(c) Endeavors to deal, instead, with the merits of the Jurisdictional Question—the applicability of the National Labor Relations Act—posed by this case.

REBUTTAL

The Board's Brief in opposition, rather than indicating an absence of conflict in lower Court decisions as well as with decisions of this Court, confirms such conflict in discussing the following bases, upon which the Court below predicated applicability of the National Labor Relations Act to the Petitioner's retail Store.

Stocking of Shelves of Store Through Interstate Channels

No decision by this Court under the National Labor Relations Act is cited to sustain the assertion that "this fact (the supplying of its shelves with merchandise obtained principally from out-state sources) alone brings Petitioner within the ambit of the commerce clause." Under such a criterion, every business, we submit, would be within its ambit and, therefore, within the coverage of the Act, as practically no mercantile or other like enterprise is wholly integral to the State of its location—the Nation is not that Balkanized. The cases which are cited at page 5 of the Board's Brief, emanating from this Court, not only do not so demonstrate but are patently distinguishable,[3] or are opposed in concept to the cases cited

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3 **Local 167, International Brotherhood of Teamsters v. United States,** 291 U. S. 293, 297, 78 L. ed. 804, involved the Sherman Anti-Trust Act, rather than the National Labor Relations Act, and expressly conceded at page 297 (808): "It may be assumed that some time after delivery of carload lots by interstate carriers to the receivers, the movement of the poultry ceases to be interstate commerce"; **Dahnke-Walker Milling Company v. Bondurant,** 257 U. S. 282, 66 L. ed. 239, involved a state licensing statute and its application to an interstate commerce transaction, but it was distinguished in **Kansas City Structural Steel Company v. Arkansas,** 269 U. S. 148,

in Petitioner's Brief (and not distinguished in the Board's Brief),[4] or reflect Circuit Court of Appeals decisions[5]

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3 (Continued)
151, 70 L. ed. 204, 205, when such decision pointed out that the local transaction in the latter case was "separate and distinct from any interstate commerce that might be involved in the performance of the contract," and the Court there added, "the fact that the materials had moved from Missouri into Arkansas did not make the delivery of them to the sub-contractor interstate commerce. So far as concerns the question here involved, the situation is the equivalent of what it would have been if the materials would have been shipped into the state and held for sale in a warehouse, and had been furnished to the sub-contractor by a dealer," and was, therefore, intrastate commerce, notwithstanding the origin of the materials.

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4 The business actually done by the Petitioner is the yardstick. "If the goods are shipped into a state without a previous sale, any sale within the state is intrastate commerce." **Gavit on Commerce Clause,** Sec. 68, p. 121. "The dividing line between an interstate sale and an intrastate sale depends upon whether or not the sale precedes or succeeds the arrival of the goods in the state, unless it be a sale in the original package. So, again, that line prima facie constitutes the dividing line between state and federal jurisdiction. A sale of goods which succeeds the arrival of the goods within the state, and which is not a sale in the original package, is intrastate commerce * * *." id. Sec. 148, p. 311. There is, therefore, no occasion for pursuing an indefinite nexus to perceive an interstate connection, when such roaming through the environs of the Store's operations at best discloses only a remote, incidental or indirect effect on the actual business done, viz., local retail sales.

5 **Virginia Electric & Power Company v. National Labor Relations Board** (C. C. A. 4), 115 Fed. (2d) 414, rev'd on other grounds 314 U. S. 469, 86 L. ed. 348, involved a utility business of "unitary character," the Respondent admitting its electrical business was engaged in interstate commerce and subject to the Act, and its gas business being held inseparable because of "repercussions in other departments" and, is, therefore, of no influence on this case; **National Labor Relations Board v. J. L. Hudson Company** (C. C. A. 6), 135 Fed. (2d) 380, cert. den. 320 U. S. 740, 88 L. ed. (adv. ops.) 27, involved a department store, but the jurisdiction was expressly placed on the national advertising, the use of federal trade-marks, the "enormous" character of the store (the third largest in the Country), its "vast operations," and other characteristics, giving it a national character, decidedly not obtaining in this case.

emphasizing the dissonance between Circuits on this topic.

Minimal Sales to Out-of-State Customers, but Largely Completed on Store Premises, Within "De Minimis" Doctrine

That the "de minimis" doctrine is applicable to an inquiry as to the coverage of the Act is beyond cavil,[6] having already been declared by this Court with respect to the Act.[7]

"Direct" Effect on Interstate Commerce Is the Explicit Requirement of This Court's Decisions Under the Act

In decisions rendered by this Court under the Act, the requirement is explicit that, in order that the Act may apply, the effect of a threatened labor dispute on Interstate Commerce must be direct, rather than indirect.[8] A

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6 There is no contention here that percentages, as, for instance, that the character, as being major or not, is exemplified by operations being either more or less than fifty per cent, are influential on the result; the issue here is whether a mere one per cent gives character to the entire one hundred per cent of operations.

7 In **National Labor Relations Board v. Fainblatt,** 306 U. S. 601, 83 L. ed. 1014, Mr. Justice Stone, twice in the course of the opinion, excluded from jurisdictional inquiry the minor fractions of interstate commerce, embraced within the "de minimis" doctrine, when he said that "* * * Congress may be taken to have excluded commerce of small volume from the operation of its regulatory measure by express provision or fair implication," and, again, in negativing any intention of Congress to make the operation of the Act dependent on any particular volume of commerce affected, he added the qualification—"More than that to which Courts would apply the maxim de minimis."

8 See cases cited at pages 49 to 51 and 47 to 49 of the Petitioner's Brief. See, also, the Employers' Liability Case (**Howard v. Illinois C. R. Co.**), 207 U. S. 463, 52 L. ed. 297, "although such local business may indirectly be related to interstate commerce."

decision rendered by this Court, not requiring such directness, with respect to a different kind of Act (although under the same commerce power), portrays no parallel, where the Act, in this case, and the statute, under consideration in the other case, have totally different objectives and demonstrate a far different envelopment of the subject of regulation.[9]

Retailing Distinguished From Manufacturing

Likewise, the repercussions, emanating from a labor dispute and halting a manufacturing operation,[10] cannot

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9 **Wickard v. Filburn,** 317 U. S. 111, 87 L. ed. 122, cited by the Board, dealt with the Agricultural Adjustment Act, the general scheme of which "as related to wheat, is to control the volume moving in interstate and foreign commerce in order to avoid surpluses and shortages and the consequent abnormally low or high wheat prices and obstructions to commerce." Congress, therefore, directly encompassed "those intrastate activities which in a substantial way interfere with or obstruct the exercise of the granted power," production of wheat exerting "a substantial economic effect on interstate commerce" and the effect of the statute being "to restrict the amount which may be produced for market and the extent as well to which one may forestall resort to the market by producing to meet his own needs." To demonstrate such substantial economic effect in that case "the parties have stipulated a summary of the economics of the wheat industry"—such stipulation and consequent summary being notably absent in this case, and the economic effect, if any, therefore, here being left to surmise or divination.

10 The stress laid in the Board's Brief on **Newport News Ship Building & Dry Dock Company v. National Labor Relations Board** (C. C. A. 4), 101 Fed. (2d) 481, mod. 308 U. S. 241, 84 L. ed. 219, significantly omits from the quotation of a single sentence therefrom, at page 7 of the Board's Brief, a revealing prior sentence, namely, "there can be no difference in principle between the case in which manufacture proceeds and that in which it follows interstate commerce." The following sentence, alone quoted in the Board's Brief, to the effect that it can make no difference from which direction an obstruction by labor disputes is applied to the flow of commerce, then reveals that the isolated sentence relates only to a

properly be assimilated to the wholly distinct retail or distribution activity, conventionally relegated to the state domain,[11] and outside of the influence of the Federal Commerce Power. A complete erasure of our dual system of Government results, if specious tests are applied which do not distinguish the wholly local retail activities,[12] in-

10 (Continued)
manufacturing operation. The manufacturing process finds mention in the preamble or predicate of the Act (see Section 1), whereas the retailing or distribution process significantly finds no mention therein. This Court, however, has never made a like statement, although manufacturing cases under the Act have been before it. On the contrary, this Court has momentarily immobilized an otherwise continuous movement to ascertain a purely local or intrastate phase under scrutiny and state its character. **Utah Power & Light Company v. Pfost**, 286 U. S. 165, 76 L. ed. 1038.

11 As this Court observed in the Trade-Mark Cases (**United States v. Steffens**), 100 U. S. 82, 25 L. ed. 550: "* * * there still remains a very large amount of commerce, perhaps the largest, which, being trade or traffic between citizens of the same state, is beyond the control of Congress. * * * If it (the Congressional Act) is not so limited, it is in excess of the power of Congress. If its main purpose be to establish a regulation applicable to all trade; to commerce at all points, especially if it is apparent that it is designed to govern the commerce wholly between citizens of the same state, it is obviously the exercise of a power not confided to Congress." So, in **United States v. DeWitt**, 9 Wall. (76 U. S.) 41, 19 L. ed. 593, this Court observed: "But this express grant of power to regulate commerce among the states has always been understood as limited by its terms; and as a virtual denial of any power to interfere wth the internal trade and business of the separate states."

12 Local retail sales are clearly outside of the ambit of the commerce power. **Banker Brothers Company v. Pennsylvania**, 222 U. S. 210, 56 L. ed. 168 (with respect to a dealer in automobiles furnished to the local purchaser, after his order to the dealer, from outside the state); **Mutual Film Corporation v. Industrial Commission**, 236 U. S. 230, 59 L. ed. 552 (with respect to a film exchange distributing moving picture films to local exhibitors from outside of the state); **Kehrer v. Stewart**, 197 U. S. 60, 49 L. ed. 663 (with respect to a meat packer's branch house, distributing meats to the local trade, the Court adding: "In carrying on the domestic busi-

dicative of the commercial activities properly outside of the periphery of the Act.[13]

Connection With Interstate Commerce Wholly Incidental in Judicial View

On the contrary, a review of the decisions of this Court in the field, where local and interstate commerce to some extent become intertwined, demonstrates that the business done by the Petitioner's Store here—local retail selling—affects interstate commerce only remotely, indirectly or incidentally.[14]

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12 (Continued)
ness, petitioner was indistinguishable from the ordinary butcher, who slaughters cattle and sells their carcasses, and in principle it made no difference that the cattle were slaughtered in Chicago and their carcasses sent to Atlanta for sale and consumption in the ordinary course of trade.")

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13 Not embraced in the Act by a specific Congressional predicate, as in the Packers and Stockyards Act, giving rise to the there applicable "current of commerce" concept (see **Stafford v. Wallace,** 258 U. S. 495, 66 L. ed. 735) or where the "subjects of it (the Commerce Power) are national in their character" (see **Robbins v. Taxing District of Shelby County,** 120 U. S. 489, 30 L. ed. 694).

14 **Wiloil Corporation v. Pennsylvania,** 294 U. S. 169, 79 L. ed. 838, which reads: "As interstate transportation was not required or contemplated, it may be deemed as merely incidental. * * * (the result) is indirect and precisely as that which would have resulted if deliveries had been made exclusively by intrastate transportation from Pennsylvania sources"; **United Leather Workers International Union v. Herkert & Meisel Trunk Company,** 265 U. S. 457, 68 L. ed. 1104, holding, "This review of the cases makes it clear that the mere reduction in the supply of an article to be shipped in interstate commerce by the illegal or tortious prevention of its manufacture (by a strike, in that instance) is ordinarily an indirect and remote obstruction to that commerce. * * * they (the strikers) did nothing which in any way directly interfered

CONCLUSION

The conflict in decisions of the respective Circuit Courts of Appeals is manifest; the divergence of the decision of the Court below from decisions of this Honorable Court in the same general field is readily perceptible; the question whether the National Labor Relations Act shall continue to be expanded so as to envelop even local retail activities—clearly outside of its range—is important.

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14 (Continued)
with the interstate transportation or sales of the Complainants' product"; **Federal Baseball Club v. National League of Professional Baseball Clubs,** 255 U. S. 200, 66 L. ed. 898, which reads: "It is true that, in order to obtain for these exhibitions the great popularity that they have achieved, competitions must be arranged between clubs from different cities and states. But the fact that, in order to give the exhibitions, the leagues must induce free persons to cross state lines, and must arrange and pay for their doing so, is not enough to change the character of the business. * * * the transport is a mere incident, not the essential thing"; **Moore v. New York Cotton Exchange,** 270 U. S. 593, 70 L. ed. 750, which reads: "If interstate shipments (of cotton) are actually made, it is not because of any contractual obligation to that effect; but it is a chance happening which cannot have the effect of converting these purely local agreements or the transactions to which they relate into subjects of interstate commerce"; **Hygrade Provision Company v. Sherman,** 266 U. S. 497, 69 L. ed. 403; **Interstate Amusement Company v. Albert,** 239 U. S. 560, 60 L. ed. 439, reading: "* * * while interstate transportation of such actors might or might not become an incident or factor in the execution of the (local booking) contract, such interstate commerce was only incidental and not a part of the agreement as made between the parties." Compare, too, **Hump Hairpin Mfg. Co. v. Emmerson,** 258 U. S. 290, 66 L. ed. 622; **Small Company v. Lamborn & Co.,** 267 U. S. 248, 69 L. ed. 597; and **Armour & Company v. North Dakota,** 240 U. S. 510, 60 L. ed. 771, which latter case held interstate commerce not involved by a sale "distinctly by retail and in the package of retail, not in the package of importation."

The Petition for Writ of Certiorari should, therefore, be granted.

Dated at Omaha, Nebraska, September 30, 1944.

Respectfully submitted,

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